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The Honorable Lonny R. Suko
Hearing Date: February 23, 2011
Response Date: January 31, 2011

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ANGELA UKPOMA,

Plaintiff,

vs.

SELECT PORTFOLIO
SERVICING, INC.,

Defendant.

NO. 2:10-cv-00420-LRS

**MEMORANDUM IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

Hearing Date and Time:

February 23, 2011, at 6:30 p.m.

WITHOUT ORAL ARGUMENT

The defendant, Select Portfolio Servicing, Inc. ("SPS"), respectfully submits this Memorandum in Support of its Motion to Dismiss. This Court should dismiss this action, filed on December 1, 2010, by plaintiff Angela Ukpoma. A week after commencing this action, on December 8, 2010, Ukpoma filed for relief under Chapter 7 of the United States Bankruptcy Code, in the Eastern District of Washington Bankruptcy Court, Case No. 10-06815-PCW7. As such, Ukpoma's claims became property of her bankruptcy estate. Because Ukpoma is not the real party in interest and lacks standing to pursue the claims asserted in this case in her individual capacity,

1 this Court should dismiss this action in its entirety. In the alternative,
 2 Ukpoma's claims should be dismissed for failure to state a claim against SPS
 3 under Fed. R. Civ. P. 12(b)(6).

4 **FACTS**

5 Ukpoma purports to bring this action against SPS, her mortgage loan
 6 servicer, under the Truth in Lending Act, 15 U.S.C. §§1601 *et seq.* ("TILA"),
 7 and the Real Estate Settlement Procedures Act, 12 U.S.C. §2602 ("RESPA").
 8 *See* Ukpoma's Original Petition, filed December 1, 2010 (Ct. Dkt. No. 1), at
 9 ¶2. Ukpoma owns the subject residence, located at 1123 Highway 395
 10 North, Kettle Falls, Washington 99141 (the "Property"), subject to a note and
 11 deed of trust securing a lien on the Property.

12 Ukpoma's mortgage obligations arise under an Adjustable Rate Note
 13 dated December 13, 2006, pursuant to which she agreed to pay \$252,000
 14 plus interest in monthly installments of \$1,575 to her original lender, Credit
 15 Suisse Financial Corporation (the "Original Lender"). *See* the supporting
 16 Declaration of Diane Weinberger, dated December 22, 2010, filed herewith
 17 (the "Weinberger Declaration"), at Exhibit A. The Note was secured by a
 18 Deed of Trust on the Property, which was duly recorded in Stevens County
 19 on December 21, 2006, under Stevens County Auditor's File No. 2006
 20 0015510. Weinberger Declaration, Exhibit B.

21 All of the Original Lender's right, title, and interest under the Note and
 22 Deed of Trust are now owned by U.S. Bank National Association, as Trustee,
 23 on behalf of the Holders of Adjustable Rate Mortgage Trust 2007-2
 24 Adjustable Rate Mortgage-Backed Pass Through Certificates, Series 2007-2
 25 (the "Trust"), pursuant to a March 17, 2008, Corporate Assignment of Deed
 26 of Trust, which was duly recorded in Stevens County on April 15, 2008,

1 under Stevens County Auditor's File No. 2008 000259. Weinberger
 2 Declaration, Exhibit C. Assignment of the Note and Deed of Trust was
 3 permitted at any time without prior notice to Ukpoma. Weinberger
 4 Declaration, Exhibit B, at ¶20.

5 SPS is a loan servicer, and has serviced Ukpoma's mortgage loan since
 6 December 2006. Ukpoma made monthly payments of \$1,575 until
 7 September 2007. She has made no payments since September 6, 2007.
 8 Weinberger Declaration, ¶8.

9 SPS initiated foreclosure proceedings, and a trustee's sale was duly
 10 scheduled for December 3, 2010. Weinberger Declaration, ¶9. Ukpoma
 11 filed the present action on December 1, 2010. On December 8, 2010,
 12 Ukpoma filed a petition for relief under Chapter 7 of the United States
 13 Bankruptcy Code, Eastern District of Washington Bankruptcy Court Case
 14 No. 10-06815. The bankruptcy case remains pending. SPS and the Trust
 15 have filed a motion for relief from stay in the bankruptcy proceedings.

16 LEGAL AUTHORITY

17 1. Ukpoma's Chapter 7 Bankruptcy Trustee, Not Ukpoma, 18 is the Real Party in Interest.

19 The filing of a petition in bankruptcy creates an estate that generally
 20 includes "all legal or equitable interests of the debtor in property as of the
 21 commencement of the case." 11 U.S.C. §541(a)(1). Any causes of action
 22 that accrue to the debtor prior to filing the bankruptcy petition are property
 23 interests included in the estate. *Integrated Solutions, Inc. v. Service Support*
 24 *Specialties, Inc.*, 124 F.3d 487, 491 (3d Cir.1997); *Cain v. Hyatt*, 101 B.R.
 25 440, 441-42 (E.D.Pa.1989); *Miller v. Shallowford Community Hospital, Inc.*,
 26 767 F.2d 1556 (11th Cir. 1985) ("property of the estate" generally includes

1 causes of action); *In re Shore Air Conditioning*, 18 B.R. 643 (Bankr. D.N.J.
 2 1982). After a claim becomes property of the estate, only the bankruptcy
 3 trustee, as representative of the estate, has the authority to prosecute or settle
 4 the cause of action. *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp.
 5 813, 839 (E.D.Pa.1993); *Cain*, 101 B.R. at 442. *See Sender v. Simon*, 84 F.3d
 6 1299, 1305 (10th Cir.1996) (holding that a bankruptcy estate includes “causes
 7 of action belonging to the debtor at the commencement of the bankruptcy
 8 case”); *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 305-308 (holding that the
 9 trustee is the real party in interest and has exclusive standing to assert pre-
 10 petition claims).

11 There can be no dispute that Ukpoma’s claims in this lawsuit accrued
 12 before her bankruptcy petition was filed. Once Ukpoma commenced her
 13 bankruptcy case, her claims became the property of her bankruptcy estate.
 14 Because Ukpoma is not the real party in interest, this Court should dismiss
 15 this action in its entirety.

16 **2. Ukpoma Fails to State a Claim Against SPS Upon Which** 17 **Relief Can Be Granted.**

18 Ukpoma’s claims against SPS should also be dismissed for failure to
 19 state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P.
 20 12(b)(6). A complaint should be dismissed if it fails to set forth facts that
 21 would entitle the plaintiff to relief. *E.g., Perfect 10, Inc. v. Visa Int’l Service*
 22 *Ass’n*, 494 F. 3d 788, 794 (9th Cir. 2007). Although a plaintiff’s allegations
 23 are generally taken as true, the court need not accept conclusory allegations of
 24 law or unwarranted inferences, and dismissal is required if the facts are
 25 insufficient to support a cognizable claim. *City of Arcadia v. U.S. Env’tl.*
 26 *Prot. Agency*, 411 F.3d 1103, 1106 n. 3 (9th Cir.2005); *see also Pena v.*

1 *Gardner*, 976 F.2d 469, 471-72 (9th Cir.1992). The plaintiff must allege facts
2 showing that the defendant's acts or omissions caused the damages of which
3 the plaintiff complains. *Accord*, *Perfect 10*, 494 F.3d at 796; *see also*
4 *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 757, 9 L.Ed.2d 770
5 (1963) (petitioner must "allege . . . facts which, if proved, would entitle him
6 to relief").

7 Here, Ukpoma's claims under RESPA and TILA are expressly and
8 necessarily founded upon alleged acts and omissions in the origination of her
9 loan by her Original Lender and real estate broker, neither of which is named
10 as a party defendant. These alleged events predated SPS's involvement with
11 the loan, and there is no allegation to the contrary.

12 Ukpoma's Original Petition contains a mish-mash of cut and pasted
13 general legal propositions and citations, but no allegations of any facts
14 pertaining to acts or omissions by SPS. Ukpoma claims that the assignment
15 of the loan to the Trust was "illegal, fraudulent and void" (*e.g.* Original
16 Petition, ¶¶23(c), 40). But she fails to set forth any specific facts to
17 substantiate this claim, which is foreclosed by the fact that her Note and
18 Deed of Trust could be expressly sold and assigned at any time.

19 Beyond those allegations, a careful review of Ukpoma's complaint
20 reveals numerous vague allegations that her original lender, broker, and
21 closing agent made misrepresentations and failed to make required
22 disclosures in the origination of the loan, but not one allegation that SPS
23 improperly serviced the loan once it took over the loan servicing obligations
24 for the Trust as assignee.

1 **CONCLUSION**

2 As the debtor in a pending bankruptcy case filed after this action was
3 commenced, Ukpoma is not the real party in interest, as her claims, if any,
4 against SPS are the property of her bankruptcy estate. Moreover, her
5 Original Petition fails to state a claim for relief against SPS. This Court
6 should therefore dismiss this action in its entirety.

7 A proposed order is attached to the Motion to Dismiss, filed herewith,
8 as Exhibit 1.

9 DATED this 27th day of December, 2010.

10 /s/ Mark A. Bailey

11 Mark A. Bailey, WSBA No. 26337

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18 *Counsel for Defendant Select*

19 *Portfolio Servicing, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System and mailed the foregoing to the following via U.S. Mail to:

Angela Ukpoma
P.O. Box 1075
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Pro Se

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Pro Se

Bruce R. Boyden, Chapter 7 Trustee
Law Offices of Bruce R. Boyden
621 West Mallon
Suite 607
Spokane, WA 99201

DATED this 27th day of December, 2010.

/s/ Mark A. Bailey

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